IGNACIA S. MORENO
Assistant Attorney General

Andrew "Guss" Guarino, Trial Attorney
Susan L. Schneider, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Div.
999 – 18th Street, Suite 370
Denver, Colorado 80202
(303) 844-1343; (303) 844-1348
guss.guarino@usdoj.gov
susan.schneider@usdoj.gov
David L. Negri, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Div.
c/o U.S. Attorney's Office
800 Park Blvd., # 600
Boise, Idaho 83712
(208) 334-1936
david.negri@usdoj.gov

Greg Addington
Assistant United States Attorney
100 W. Liberty Street, Suite 600
Reno, Nevada 89501
(775) 784-5438
greg.addington@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, WALKER RIVER PAIUTE TRIBE, Plaintiff-Intervenor, vs. WALKER RIVER IRRIGATION DISTRICT, a corporation, et al., Defendants.	IN EQUITY NO. C-125-RCJ Subproceedings: C-125-B 3:73-CV-00127-RCJ-WGC **THE UNITED STATES OF AMERICA'S REPLY CONCERNING THE MOTION FOR A SUPPLEMENTAL CASE MANAGEMENT ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

The United States of America ("United States") replies to the *Walker River Irrigation District's Opposition to Motion of the United States of America for Supplemental Case Management Order* ("Response") (Doc. B-1814).

I. ARGUMENT IN REPLY

A. The Supplemental CMO is the most efficient, fair, and effective means for the Court to address and resolve the Tribal Claims in a timely manner.

This subproceeding addresses the water rights claims asserted by the Walker River Paiute Tribe ("Tribe") and the United States on behalf of the Tribe (collectively, "Tribal Claims"), and additional water rights claims asserted by the United States ("Federal Claims"). *See First Amended Counterclaim of the Walker River Paiute Tribe* (Doc. B-58) ("Tribal Counterclaim") and *First Amended Counterclaim of the United States of America* (July 31, 1997; Doc. B-59) ("U.S. Counterclaim"). Pursuant to the *Case Management Order* ("CMO") (Doc. B-108), the Tribal Claims have been bifurcated from the remaining Federal Claims. CMO at pg. 4 ¶ 1. As a result, the immediate focus of this Court is on only three claims: 1) quantification of a water rights claim associated with Weber Reservoir; 2) quantification of groundwater rights for groundwater underlying the Walker River Paiute Reservation ("Reservation"); and 3) quantification of water rights associated with lands added to the Reservation in 1936 and thereafter. *See* U.S. Counterclaims. Nothing about these three straightforward water rights claims presents issues so overwhelming or complex that they require the Court to disregard the Federal Rules of Civil Procedure in favor of a process under which objections and defenses to these claims would be litigated before the claims themselves.

In the CMO, the Court invited the parties to submit recommendations to address case management following the completion of service. CMO at pg. 8, ¶10. Now that service is near completion and litigation of the Tribal Claims is about to commence, the United States has

responded to the Court's request. In the *Motion of the United States of America for Supplemental Case Management Order* ("Motion") (Doc. B-1772) the United State presented and articulated the need for its proposed Supplemental Case Management Order ("Supplemental CMO") (Doc. B-1772-1). The Supplemental CMO is consistent with the Federal Rules of Civil Procedure and is the most efficient, effective, and fair means by which this Court can address and resolve the merits of the Tribal Claims. In its Response, the Walker River Irrigation District ("WRID") opposes the Motion and entry of the Supplemental CMO and argues that the Supplemental CMO would lead to a longer, more drawn out process. A brief consideration of the differences between the approaches of the parties is necessary to show that WRID's contentions are without basis.

1. The United States' Approach to Case Management, as Proposed in the Supplemental CMO

The Supplemental CMO ensures that the Court can address the merits of the Tribal Claims, as well as defendants' objections. The Supplemental CMO contemplates that once service is complete, any party opposing the Tribal and/or Federal Claims may file a motion to dismiss pursuant to Fed. R. Civ. P. ("FRCP") Rule 12.[1] Supplemental CMO at ¶¶ 2 and 3. Such motions would raise all facial, legal challenges to both the Tribal and Federal Claims, including jurisdictional challenges and challenges that the Tribe and United States are not entitled to relief as a matter of law.[2] In doing so, such motions would raise many of the "threshold issues"

[1] The CMO would require all appropriate Rule 12 motions to be filed at this point, in accordance with the Federal Rules of Civil Procedure. For example, Rule 12(b)(5) allows defendants to challenge service of process. Although few such motions may be filed due to the Court's periodic reviews of service efforts, such motions must be filed at this point or not at all.

[2] The CMO implicitly recognizes that the Court can take up issues associated with the Tribal and Federal Claims to the extent that such a step makes good sense. *See* CMO at pg. 4 ¶ 2 ("All discovery and all other proceedings in this action included in or in connection with the said First

contemplated by the CMO.[3] Motions made pursuant to FRCP Rule 12 would not involve discovery or further factual development and would allow the Court to examine at one time the legal sufficiency of all of the Tribal and Federal Claims. To the extent the Court finds any claims wanting, it would dismiss such claims and absent appeal no party would be further burdened with defending or challenging them. As embraced by FRCP Rule 12, this first step in this, or any, litigation is the most efficient means by which the Court can determine whether discovery, dispositive motions, the merits of a claim and defenses thereto should be further considered.

The Supplemental CMO contemplates that once all legal challenges to the Tribal and Federal Claims have been addressed, the Court will address the merits of the bifurcated Tribal Claims. Here, as contemplated by the Federal Rules of Civil Procedure, the parties will answer (or otherwise object to) the Tribal Claims and present any affirmative defenses, crossclaims, or counterclaims they might have.[4] This step is fundamentally fair and necessary because it

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Amended Counterclaims are stayed, until further order of the court, … .” (emphasis added)). As described in the Supplemental CMO, the Court should hear all legal challenges to the Tribal and Federal Claims at the same time. Such challenges will necessarily have much overlap; therefore, it is logical and efficient for the Court to address these questions of law simultaneously. *See* CMO at pg. 2 (“There does not seem to be any way to entirely avoid duplication[of the Tribal and Federal Claims], but we should endeavor to do so to the extent we can.”).

[3] In the CMO, the Court implicitly recognized that there may be no threshold issue that is so compelling that the Court must address the issue in the first instance. According to the CMO: “The Magistrate Judge shall receive recommendations of the parties for procedures for scheduling and for the efficient management of the litigation ….” CMO at pg. 8, ¶ 10. Further, far from a mandate to create a list of threshold issues, the Court sensibly required that “the Magistrate Judge shall consider and make a preliminary determination of the threshold issues … .” *Id.* at pg. 9 ¶ 11 (emphasis added). As outlined in its Motion and the Supplemental CMO, the United States recommends that threshold issues be limited to those issues associated with motions to dismiss pursuant to FRCP Rule 12.

[4] As discussed below, a party presenting counterclaims/cross claims to the Tribal Claims is not required to assert its own water rights claims. This subproceeding centers on the Tribal and

provides the United States and the Tribe with an understanding of the basis for objection of an opposing party. Also, by requiring answers, the Court can narrow these proceedings to only those parties that seek to challenge the Tribal Claims. Further, this information will also allow the United States and the Tribe to determine whether to seek the dismissal of any answer, defense, or counterclaim/crossclaim as a matter of law, which may further streamline this litigation in a manner consistent with the Federal Rules of Civil Procedure.

Once answers/objections have been filed, all parties will engage in discovery, after which all parties can present dispositive motions to the Court. *See* FRCP Rule 56(a). Finally, and subject to further orders of the Court, if any material factual dispute remains with respect to the Tribal Claims, the Supplemental CMO contemplates that the Court will conduct an evidentiary hearing on such issues.

In sum, the United States position is simply that by following the Federal Rules of Civil Procedure, the Supplemental CMO allows for the most orderly, efficient, and effective resolution of the Tribal Claims.

2. WRID's Approach to Case Management:

Federal Claims. The only compulsory counterclaims that might be contemplated for this sub proceedings should pertain to the limited possibility of a claim to the very water rights asserted by the United States and Tribe (*e.g.* a water rights asserted by non-Indians based upon the original tribal nature of the water right as recognized by *Colville Confederated Tribes v, Walton,* 647 F2d 42 (9th Cir. 1981) and the subsequent line of cases). FRCP Rule 13(a). To the extent that any party wishes to pursue a permissive counterclaim, the Court has discretion to decline to address such a counterclaim if it would unduly complicate this litigation. FRCP Rule 13(b); *S.E.C. v. American Free Enterprise Institute*, 580 F. Supp. 270, 272-3 (D.AZ. 1984); *Rosemont Enterprises, Inc. v. Random House, Inc.,* 261 F.Supp. 691, 697 (S.D.N.Y. 1966) (permissive counterclaims dismissed when they "might well make a shambles of controversies already sufficiently complex."). Obviously, the Court and the parties would have to first examine any counterclaims/crossclaims filed to determine whether such counterclaims/crossclaims should be considered in this subproceeding; nonetheless, the threat of such counterclaims/cross claims is not a basis to immediately proceed to threshold issues.

In contrast, WRID purports to follow the suggestions of the existing CMO, which was issued more than a decade ago, strictly and without modification; even so, WRID's description of how it envisions that the litigation should proceed under the CMO would constitute an amendment of the CMO. WRID suggests that the only efficient way to conduct this proceeding is to front-load it by litigating "threshold issues" and defenses, the early resolution of which, WRID contends, may shorten or simplify the litigation. Response at 9.[5] In WRID's view, threshold issues and defenses include jurisdictional challenges, questions of law, and defenses developed by those opposing the Tribal Claims.[6] According to WRID, such issues should be presented and decided before any element of the Tribal Claims is presented, let alone established. *Id.* at pg. 10.

The necessary outcome of WRID's proposed procedures is that only after threshold issues are decided would any party be required to issue a motion to dismiss under FRCP Rule 12, answer the Tribal Claims, or presumably articulate additional affirmative defenses, counterclaims and crossclaims. Thus, the United States and the Tribe would endure a series of one-sided discovery requests on the threshold issues from potentially thousands of participants who have not been required to articulate any position in this subproceeding. This would be followed by separate trials on threshold issues and defenses. Throughout this period of threshold issues determination, the United States and Tribe would have no basis for understanding any

[5] Of course, this is true only if the litigation of threshold issues and defenses actually defeats the Tribal Claims; if not, that separate litigation will have only lengthened and complicated litigation of the Tribal Claims.

[6] As previously explained by the United States, the United States and the Tribe do not have "threshold issues;" they have the Tribal Claims, which they are entitled to have addressed in this proceeding pursuant to the Federal Rules of Civil Procedure. The "threshold" issues contemplated by WRID are little more than an unwarranted barrage of factual/legal challenges raised in the nascent stages of litigation to defeat the Tribal Claims.

party's objection to the Tribal Claims, no ability to seek discovery on the objections held by an opposing party, and no ability to develop the basis for or pursue dispositive motions in favor of the Tribal Claims. Assuming the Tribal Claims survive that gauntlet, the United States and the Tribes would be right back at the beginning of this litigation and exposed to a second round of discovery, followed by a second round of dispositive motions and evidentiary hearings, on the merits of the Tribal Claims

3. The Differences Between the United States' and WRID's Approaches

The difference in processes outlined in the Motion and the Response is stark. Under the Supplemental CMO, the United States proposes that the Court address the merits of the Tribal Claims and the challenges to those claims by following the Federal Rules of Civil Procedure. These rules were crafted to meet the needs of litigation (including complex litigation) in courts throughout the United States and no reason exists why the circumstances of this subproceeding are so different as to make the Federal Rules of Civil Procedure unworkable. As outlined in the Response, WRID's proposal would ensure that, for the indefinite future, the Court will have to invent unique procedures to manage the litigation of the threshold issues and defenses, including the scope of discovery, that defendants might seek to pursue. The Federal Rules of Civil Procedure do not embrace such a process. Moreover, imposing such a process in this subproceeding would be unfair to the Tribe and the United States because it would impose burdens on the Tribe and the United States unnecessarily and ignore the merits of the Tribal Claims indefinitely.

B. The Tribal Claims are neither too big nor too complex to bar use of the Federal Rules of Civil Procedure.

Throughout its Response, WRID argues that this subproceeding is too big and too complex for orderly disposition under the Federal Rules of Civil Procedure. *See e.g.* Response at

pg. 10 (describing litigation of the three Tribal Claims under the Supplemental CMO as a "massive proceeding"). WRID's argument is based on only two grounds: 1) that thousands of persons and entities are involved in the subproceeding (*id.* at pgs. 1-2, 7, 9, and 11); and 2) that if the Tribal Claims proceed, the Court would have to adjudicate all relative rights and priorities to surface and groundwater in the Walker River Basin (*id.* at pgs. 6 and 19). Neither of these arguments has merit.[7]

1. The Number of Potential Objectors to the Tribal Claims

Although many potential defendants in this subproceeding have waived service or were personally served and have elected not to file an appearance, WRID is correct that many have filed a notice of appearance and intent to participate.[8] But the total number of defendants in this subproceeding reflects only the ultimate number of potential participants, and that number is the same - , and no more or less manageable - whether the Court asks the parties to submit FRCP Rule 12 motions under the Supplemental CMO or to develop and litigate threshold issues. Moreover, the number of defendants who are active participants (i.e. those who appeared in this

[7] When considering either circumstance, it is important to keep in mind the very limited nature of the Tribal Claims:1) a right to the water (approximately 13,000 acre-feet) stored in Weber Reservoir; 2) a right to the groundwater underlying the Walker River Paiute Reservation; and 3) a right to surface water of the Walker River for lands added to the Reservation in 1936 and thereafter. U.S. Counterclaims; Tribal Counterclaims.

[8] At the time of the filing of this Reply, approximately 5,200 persons/entities have been served by mail with notice of this subproceeding over the last decade pursuant to the orders of this Court. Of the persons/entities contacted, approximately 1,100 persons/entities have waived service and chosen to have no further involvement in this case. In addition, of those served by mail, approximately 1,500 person/entities were additionally personally served; however, it is likely that few if any of those personally served will choose to further participate in these proceedings or to object to the Tribal Claims. Of those personally served, approximately 300 person/entities filed a notice of intent to participate after being personally served. To date, a total of approximately 1,150 persons/entities have indicated that they intend to further participate in this case. Of course, only a fraction of those who expressed an intent to participate will submit an answer or objection to the Tribal Claims.

case and choose to become substantively involved in this case and present answers to the Tribal Claims) will be a much smaller and more manageable number. Further, litigating an unknown number of threshold issues (including issue development, potential discovery, briefing, and trial, as the Response describes) before answers/objections are served will only ensure that the numerous parties will remain involved in this case unnecessarily. The most efficient and effective way to narrow the scope of this subproceeding is to reduce the number of participants who wish to oppose the Tribal Claims by requiring that answers to the Tribal Claims be filed following the resolution of Rule 12 motions, pursuant to the Federal Rules of Civil Procedure, as outlined in the Supplemental CMO.[9]

2. Counterclaims and Crossclaims of Other Water Rights Holders

WRID also raises the specter that if this Court follows the Federal Rules of Civil Procedure and requires parties to comply with Rule 12 and then file answers, this subproceeding would be overwhelmed by counterclaims and crossclaims. Response at pgs. 2, 6-7, and 18. Specifically, WRID argues that the Tribal Claims "require that all defendants assert any claims that they may have to surface water established under state law … and to groundwater" (*id.* at pg. 6) and that "all claimants [who claim a water right] will need to file counterclaims against the Tribe and the United States and crossclaims against other defendants with respect to their claims to that source of supply." (*id.* at pg 19). This argument is a strawman.

Litigation of the Tribal Claims does not require the Court to initiate a general stream adjudication of the surface and groundwater of the Walker River Basin. The Tribal Claims ask

[9] To the extent that any party wishes to remain informed of the progress of these proceedings, the Court is in the process of establishing a process allowing such parties to do so. *See Notice of Proposed Order Regarding Service and Filing In Subproceeding C-125-B On and By Unrepresented Parties* (B-1779)

this Court only to recognize and quantify water rights as described in the U.S. Counterclaims and the Tribal Counterclaims. Contrary to WRID's assertions, nothing in the relief requested requires that any other party assert its claims to surface and groundwater in the Walker River Basin. *See* Response at pg. 6. Indeed, a party would have to make a counterclaim in these proceedings only to the extent the party believes it has a competing claim to the very water rights sought by the Tribal Claims. *See* FRCP Rule 13(a); Supplemental CMO at ¶ 7; *compare* FRCP Rule 13(b).

Neither the number of parties involved in this proceeding nor the possibility of counterclaims or crossclaims supports the assertion that this Court must first litigate a series of threshold issues and defenses to a conclusion before any answers/objections are articulated by any opposing participating party and before addressing the merits of the Tribal Claims. Instead, if any uncertainty exists concerning the circumstances of litigation, the Court should steadfastly rely upon the proven procedures articulated in the Federal Rules of Civil Procedure.

C. At this time, FRCP Rule 42(b) is not applicable to this sub-proceedings.

In its Response, WRID introduces FRCP Rule 42(b) to justify its view that developing and litigating threshold issues[10] first, and in isolation from the merits of the Tribal Claims, is an appropriate step to take at this stage of the proceeding. Response at pgs. 14-17. WRID's reliance on this rule is misplaced.

FRCP Rule 42(b) provides:

> **(b) Separate Trials.** For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims,

[10] As described in the Motion and consistent with the Federal Rules of Civil Procedure, the threshold issues that the Court should consider at this time are those contemplated by Rule 12 including all challenges to this Court's jurisdiction to hear the Tribal and Federal Claims and any challenge that the Tribe/United States have failed to state a claim for which relief can be granted. *See e.g.* FRCP Rule 12(b)(1) and (6).

> counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

This straightforward language recognizes that at the appropriate time and under the appropriate circumstances, a court may order a separate trial of one or more issues or claims. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) (noting the court has broad discretion to bifurcate a trial under Rule 42(b)). Holding separate trials, however, is an unusual course of action, because "a single trial will usually be more expedient and efficient." *Skyline Potato Co., Inc. v. Tan-O-On Marketing, Inc.*, 2012 WL 2384087 *9 (D.NM 2012) (Slip Copy) *quoting* 8 J. Moore, *Moore's Federal Practice* § 42.20[4][a], at 42–46. When considering whether to order a separate trial, "it is the interest of efficient judicial administration that is to be controlling under the rule, rather than the wishes of the parties." 9A C.Wright & A. Miller, *Federal Practice and Procedure* (3d. ed. 2012) § 2388. Further, although a separate trial may be ordered on issues such as jurisdiction or venue, "these matters may not be separated if they are related closely to the merits of the action." *Id. at* § 2389.[11] FRCP Rule 42(b) is not a mechanism that swallows and obviates all other procedural rules.

In any event, nowhere in the CMO does the Court suggest that it was invoking FRCP Rule 42(b). WRID wrongly assumes that the Court previously mandated litigation of all threshold issues; it did not. *See e.g.* CMO at pg. 8 ("the Magistrate Judge shall receive recommendations of the parties for procedures for scheduling and for the efficient management of the litigation given the number of parties to the case" (emphasis added)) at pg. 9 ("the Magistrate Judge shall consider and a make a preliminary recommendation of the threshold

[11] It is notable that Rule 42 is located in the "Trials" chapter of the rules and after all other rules associated with commencing an action, pleadings and motions, and discovery. *See* FRCP (table of contents). This strongly suggests that FRCP Rule 42(b) is more properly invoked after motions and discovery have been completed, specific litigation issues have been developed, and shortly before trial.

issues to be addressed" (emphasis added); at pg. 14 ("The Magistrate Judge shall have authority to change, modify and adjust this order." (emphasis added)). There is simply no example to be found where a court has invoked FRCP Rule 42(b) and mandated a host of separate trials before the court identified the issue(s) to be subject to a separate trial.

The United States does not suggest that the Count can never invoke FRCP Rule 42(b); however, the circumstances of this subproceeding certainly do not justify the invocation of FRCP Rule 42(b) at this time. The cases cited in the Response that are the most relevant examples of a court ordering separate trials are quickly distinguishable from the circumstances of this subproceeding. In *Nevada v. United States*, 463 U.S. 110, 119 (1983) and *United States v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10 (D.NV. 1975) the district court ordered separate litigation specifically and exclusively on the *res judicata/*collateral *estoppel* defense after such defenses were asserted by defendants. The court did not order separate litigation on a host of undetermined threshold issues. In this subproceeding, no defendant has articulated a *res judicata/collateral estoppell* defense because no defendant has been required to articulate such a defense in either a motion to dismiss or as an affirmative defense.

Ultimately, WRID's proposal to develop and litigate threshold issues before addressing the merits of the Tribal Claims puts the cart squarely before the horse. FRCP Rule 42(b) provides neither authority nor support for WRID's position. As described above, the Tribal Claims themselves present three straightforward claims for relief, and it is premature to invoke Rule 42(b) before completing the normal pre-trial process set out in the FRCP. Further, the prejudice to the Tribe and the United States from the pursuit of unspecified threshold issues is undeniable. Threshold issue litigation will impose burdens only upon the Tribe and the United

States, strip all context of the Tribal Claims from the litigated issues/defenses yet undefined, and indefinitely delay the merits of the Tribal Claims.

II. CONCLUSION

For these and such other reasons that may appear to the Court, the United States respectfully requests that the Court enter the Supplemental Case Management Order attached to the Motion.

Dated: January 25, 2012

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

Andrew "Guss" Guarino, Trial Attorney
Susan L. Schneider, Trial Attorney
David L. Negri, Trial Attorney
Greg Addington, Assistant United States Attorney

By /s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino
U.S. Department of Justice
Environmental and Natural Resources Div.
999 – 18th Street, Suite 370
Denver, Colorado 80202
(303) 844-1348
Guss.guarino@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2013, I electronically filed the foregoing **THE UNITED STATES OF AMERICA'S REPLY CONCERNING THE MOTION FOR A SUPPLEMENTAL CASE MANAGEMENT ORDER AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case;

and I further certify that I served a copy of the forgoing to the following non CM/ECF participants by U.S. Mail, postage prepaid, this 25th day of January, 2013:

Athena Brown, Superintendent
Western Nevada Agency
Bureau of Indian Affairs
311 E. Washington Street
Carson City, NV 89701-4065

Allen Biaggi/Leo Drozdoff
Dept. of Conservation & Natural Res.
State of Nevada
901 S. Stewart St.
Suite 1003
Carson City, NV 89701

State Engineer - Division of Water Resources
State of Nevada
901 S. Stewart St., Suite 202
Carson City, NV 89701

William J. Shaw
Brooke & Shaw, Ltd
P.O. Box 2860
Minden, NV 89423

George M. Keele
1692 County Road, Ste. A
Minden, NV 89423

Arthur B. Walsh
Los Angeles City Attorney's Office
PO Box 51-111
111 North Hope Street, Suite 340
Los Angeles, CA 90054

/s/ Eileen Rutherford
Senior Paralegal, USIS for
United States Department of Justice